

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

\* \* \*

**UNITED STATES OF AMERICA,**

Plaintiff,

V.

JORGE RAMOS-BARAJAS,

## Defendant

Case No.: 2:18-cr-00259-KJD-GWF

## **FINDINGS AND RECOMMENDATION**

**Re: Motion to Dismiss (ECF No. 22)**

14 This matter is before the Court on Defendant Jorge Ramos-Barajas's Motion to Dismiss  
15 Indictment (ECF No. 22), filed on January 28, 2019. The Government filed its Opposition (ECF  
16 No. 28) on February 25, 2019, and Defendant filed his Reply (ECF No. 31) on March 8, 2019.  
17 The Court conducted a hearing in this matter on March 12, 2019. As a result of the issues  
18 discussed during the hearing, the Court directed the parties to file supplemental briefs. The  
19 Government filed its Supplemental Brief (ECF No. 33) on March 19, 2019 and Defendant filed  
20 his Reply (ECF No. 34) on March 26, 2019.

## **BACKGROUND**

22 Defendant Jorge Ramos-Barajas is charged in the indictment with being a deported alien  
23 found unlawfully in the United States in violation of 8 U.S.C. § 1326. The indictment alleges  
24 that Defendant was deported and removed from the United States on February 7, 2012, and that  
25 he was thereafter found in the United States on July 21, 2016, “having reentered and remained in  
26 this country, and not having obtained express permission from the Attorney General of the  
27 United States or the Secretary for Homeland Security, to apply for admission into the United  
28 States.” *Criminal Indictment* (ECF No.1).

1           Defendant Ramos-Barajas was convicted on September 2, 2011 in the District Court,  
2 Clark County, Nevada of possession of a controlled substance with intent to sell (a category D  
3 felony) in violation of Nevada Revised Statute (NRS) 453.337. *Government's Opposition* (ECF  
4 No. 28), *Exhibits 1 and 2*. On January 19, 2012, he was served with a Notice to Appear for a  
5 removal hearing before an immigration judge ("IJ"). The Notice stated that Defendant was  
6 subject to removal (1) pursuant to Section 212(a)(6)(A)(i) of the Immigration and Nationality  
7 Act ("INA") (8 U.S.C. § 1182(a)(6)(i)) because he was an alien present in the United States  
8 without having been lawfully admitted or paroled; and (2) pursuant to Section 212(a)(2)(A)(i)(II)  
9 (8 U.S.C. § 1182(a)(2)(i)(II)) because he had been convicted of a crime "relating to a controlled  
10 substance (as defined in Section 102 of the Controlled Substances Act (21 U.S.C. § 802))." See  
11 *Motion to Dismiss* (ECF No. 22), *Exhibit A*.

12           Following the removal hearing on January 30, 2012, the immigration judge ordered that  
13 Defendant be removed from the United States. Defendant waived his right to appeal from the  
14 removal order. *Motion to Dismiss* (ECF No. 22), *Exhibit C*. Although a transcript of the  
15 removal hearing has not yet been obtained, the parties do not dispute that the immigration judge  
16 viewed the Defendant's prior conviction as an "aggravated felony" under Section 237(a)(2) of  
17 the INA (8 U.S.C. § 1227(a)(2)(iii)). The only statutory definition of "aggravated felony" under  
18 which Defendant's conviction would qualify as such is 8 U.S.C. § 1101(a)(43)(B) which defines  
19 the term to include "illicit trafficking in a controlled substance (as defined in section 102 of the  
20 Controlled Substances Act [21 U.S.C. § 802], including a drug trafficking crime (as defined in  
21 section 924(c) of Title 18, United States Code)."

22           An alien who has been convicted of an aggravated felony is not eligible for discretionary  
23 relief from deportation or removal. *Montcrieffe v. Holder*, 569 U.S. 184, 133 S.Ct. 1678, 1682  
24 (2013). Absent an aggravated felony conviction, the immigration judge must inform the alien of  
25 his or her eligibility to apply for discretionary relief, including voluntary departure. An alien  
26 who has been granted voluntarily departure is not subject to prosecution under 8 U.S.C. § 1326 if  
27 he is later found in the United States. Because the immigration judge viewed Defendant's prior  
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1 conviction as an aggravated felony, he did not advise Defendant that he was eligible to apply for  
 2 voluntary departure.

3 The initial focus of Defendant's motion to dismiss was that his Nevada conviction under  
 4 NRS 453.337 did not categorically qualify as an aggravated felony because the scope of conduct  
 5 punishable under that statute is broader than the scope of conduct punishable under 21 U.S.C. §  
 6 802. Defendant also argued that NRS 453.337 is not a divisible statute, and, therefore, the Court  
 7 cannot apply the "modified categorical approach" to determine if the conduct for which  
 8 Defendant was convicted qualifies as a drug trafficking offense under the federal statute. The  
 9 Government has stipulated for purposes of this case that Defendant's conviction under NRS  
 10 453.337 is not an aggravated felony.<sup>1</sup> Based on that stipulation, the focus of the motion to  
 11 dismiss turned to whether the immigration judge's failure to inform Defendant that he was  
 12 eligible to apply for voluntary departure violated his constitutional right to Due Process of Law  
 13 and caused him prejudice.

#### DISCUSSION

15 An alien charged with illegal reentry under 8 U.S.C. § 1326 has a Fifth Amendment right  
 16 to collaterally attack his removal order because it serves as a predicate element for conviction  
 17 under the statute. *United States v. Cisneros-Rodriguez*, 813 F.3d 748, 755 (9th Cir. 2015)  
 18 (citing *United States v. Ubaldo-Figueroa*, 364 F.3d 1042, 1047 (9th Cir. 2004) and *United States*  
 19 v. *Mendoza-Lopez*, 481 U.S. 828, 837-38, 107 S.Ct. 2148 (1987)). The defendant's right to  
 20 collaterally attack the removal order is codified in 8 U.S.C. § 1326(d). Under the statute, "a  
 21 defendant must, within constitutional limitations, demonstrate that (1) he exhausted all

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22 <sup>1</sup> In *United States v. Figueroa-Beltran*, 892 F.3d 997 (9th Cir. 2018), the issue before the court was  
 23 whether the defendant's prior conviction under NRS 457.337 is a drug trafficking offense under Section  
 24 2L.12 of the Sentencing Guidelines which would increase defendant's sentence following his conviction  
 25 under 8 U.S.C. § 1326. The Ninth Circuit found that Nevada Supreme Court decisions are in conflict as  
 26 to whether NRS 457.337 is a divisible statute. The court, therefore, certified the question of divisibility to  
 27 the Nevada Supreme Court, which it has yet to answer. In *United States v. Aquero-Cadenas*, 2018 WL  
 28 3518453, at \*3 (D.Nev. Jul. 20, 2018), the district court dismissed an indictment under 8 U.S.C. § 1326  
 on the ground that defendant's conviction under [NRS 453.337](#) does not qualify as an aggravated felony,  
 and that the immigration judge failed to inform him of any potential relief from removal. Although the  
 district court was aware of the decision in *Figueroa-Beltran*, it concluded that [NRS 453.337](#) is not a  
 divisible statute. The Government has appealed from the dismissal order.

1 administrative remedies available to him to appeal his removal order, (2) that the underlying  
 2 removal proceedings at which the order was issued improperly deprived him of the opportunity  
 3 for judicial review, and (3) the entry of the order was fundamentally unfair.” *Id.* at 755-756. An  
 4 underlying removal order is fundamentally unfair if (1) the defendant’s due process rights were  
 5 violated by defects in his underlying deportation proceeding, and (2) he suffered prejudice as a  
 6 result of the defects.

7         The immigration judge is obligated to inform an alien of his apparent eligibility for forms  
 8 of relief from deportation such as voluntary departure. *United States v. Valdez-Novoa*, 780 F.3d  
 9 906, 913 (9th Cir. 2015) (citing 8 C.F.R. § 1240.11(a)(2) and *United States v. Arrieta*, 224 F.3d  
 10 1076, 1079 (9th Cir. 2000)). “[W]here the record contains an inference that the petitioner is  
 11 eligible for relief from deportation, ‘the IJ must advise the alien of this possibility and give him  
 12 the opportunity to develop the issue.’” *Arrieta*, 224 F.3d at 1079. The immigration judge’s  
 13 failure to so inform the alien, excuses him from having to demonstrate that he exhausted any  
 14 administrative remedies that might have been available. *Valdez-Novoa*, 780 F.3d at 913 (citing  
 15 *United States v. Vidal-Mendoza*, 705 F.3d 1012, 1015 (9th Cir. 2013)). It also serves to deprive  
 16 the alien of the opportunity for judicial review. *Id.* (citing *United States v. Rojas-Pedroza*, 716  
 17 F.3d 1253, 1262 (9th Cir. 2013)). *See also United States v. Gonzalez-Flores*, 804 F.3d 920, 927  
 18 (9th Cir. 2015). Under the third prong of § 1326(d), the alien has the burden of proving  
 19 prejudice. *Valdez-Novoa*, 780 F.3d at 916-17; *Gonzalez-Flores*, 804 F.3d at 927.

20         The immigration judge’s failure to advise an alien of his apparent eligibility for voluntary  
 21 departure causes prejudice only if it was plausible that the immigration judge would have granted  
 22 voluntary departure if had it been requested. *Valdez-Novoa*, 780 F.3d at 914 (citing *United*  
 23 *States v. Cisneros-Resendiz*, 656 F.3d 1015, 1018 (9th Cir. 2011)). Establishing “plausibility”  
 24 requires more than establishing a mere possibility or that it was conceivable that voluntary  
 25 departure would have been granted. *Id.* at 914-15. The court in *Valdez-Novoa* explained the  
 26 general process for determining whether the defendant was prejudiced:

27             Every case involving the prejudice prong of § 1326(d)(3) proceeds in much the  
 28 same way: the defendant cites cases from the courts and the BIA where an

alien with similar equities was granted the discretionary relief at issue, and the government distinguishes those cases, cites cases to the contrary, or argues that the cases relied on by the defendant are outliers. We have always (1) placed the burden on the defendant to show that he was prejudiced by the due process violation, (2) evaluated the authorities cited by the defendant, (3) compared them to the authorities offered by the government, and (4) determined whether the defendant has carried his burden to prove that he suffered prejudice.

780 F.3d at 916.

In determining plausibility, the court first identifies the factors relevant to the immigration judge's exercise of discretion for the relief being sought. Second, the court determines whether in light of those factors, and based on the unique circumstances of the alien's own case, it is plausible that the immigration judge would have exercised his discretion in the alien's favor. *Id.* at 917 (citing *Rojas-Pedroza*, 716 F.3d at 1263). The factors relevant to granting voluntary departure are the alien's negative and positive equities. *Id.* (citing *Matter of Gamboa*, 14 I. & N. Dec. 244, 248 (BIA 1072); *Rojas-Pedroza*, 716 F.3d at 1264-65). "The negative equities include 'the nature and underlying circumstances of the deportation ground at issue; additional violations of the immigration laws; the existence, seriousness, and recency of any criminal record; and other evidence of bad character or the undesirability of the applicant as a permanent resident.' *Matter of Arguelles-Campos*, 22 I. & N. Dec. 811, 817 (BIA 1999). The positive equities 'are compensating elements such as long residence here, close family ties in the United States, or humanitarian needs.' *Id.*" *Valdez-Novoa*, 780 F.3d at 917.

The indictment alleges that Defendant Ramos-Barajas was deported and removed from the United States on or about February 7, 2012. *Indictment* (ECF No. 1). No other deportations or removals are alleged. Defendant argues that he had only one prior voluntary return to Mexico and only one criminal conviction. He states that "[a]part from these two contacts with law enforcement officials, only one of which resulted in a conviction, there is no other evidence of bad character." *Defendant's Reply to Government's Supplemental Response* (ECF No. 34), at 3. Defendant does not cite any positive equities such as long residence in the United States, close family ties in the United States, or humanitarian needs. The Government cites only Defendant's September 2011 felony conviction for possession of a controlled substance with intent to sell as a negative equity. Thus, the Court must determine whether it was plausible that the immigration

1 judge would have granted a request for voluntary departure, based solely on Defendant's limited  
2 criminal record and lack of prior deportations, but without any positive equities.

The Ninth Circuit’s decision in *United States v. Gonzalez-Flores*, 804 F.3d at 928-29, casts considerable doubt on Defendant’s assertion that it is plausible he would have been granted voluntary departure. The defendant in that case had a 2004 conviction for robbery in violation of California Penal Code § 211 and was sentenced to 210 days in the county jail. He also had two prior misdemeanor convictions for driving without a license and for loitering in a park after hours. The defendant entered the United States from Mexico in 1999 when he was 15 years old. He attended high school, but dropped out after the eleventh grade to start working. He was employed for several years at the airport loading food onto passenger planes. Following his robbery conviction, defendant was deported in November 2004. He reentered the United States in 2008, and again in 2013 at which time he was indicted under 8 U.S.C. § 1326.

13        The court noted that defendant's positive equities were "minimal." *Id.* at 928. Although  
14      the immigration judge was not informed of defendant's high school attendance and work history,  
15      the court stated that "these additional facts did not contradict the IJ's conclusion that Gonzalez-  
16      Flores' equities were 'very few except for those normally associated with any residence of any  
17      duration.' Because none of Gonzalez-Flores' family members were United States citizens or  
18      lawful permanent residents, and because he resided in the United States for only five years, he  
19      lacked close family ties to the United States or a long residence here, the most typical favorable  
20      equities deemed important in other cases. *See Arguellas-Campos*, 22 I. & N. Dec. at 817." *Id.*  
21      In holding that the defendant had not met his burden of showing that aliens in similar  
22      circumstances received relief, the court stated:

The Ninth Circuit cases identified by Gonzalez–Flores involve aliens who had far more significant positive equities, even though they also had more significant negative equities. Gonzalez–Flores has pointed to no case in which an alien with so few positive equities has been granted relief. In *United States v. Alcazar–Bustos*, we held that it was plausible a defendant would be granted voluntary departure where the defendant had lived in the United States since he was two months old and had a United States citizen wife and child, even though the defendant's criminal history included firearm possession convictions, and showed association with gang members and prior drug use.

382 Fed.Appx. 568, 569–71 (9th Cir. 2010). Likewise, in *United States v. Vasallo-Martinez*, we held it was plausible a defendant would be granted voluntary departure where the defendant resided in the United States for 21 years, had a United States citizen wife and child, and owned a business, because these positive equities outweighed the defendant's four convictions for driving under the influence and three unrelated misdemeanors. 360 Fed.Appx. 731, 732–33 (9th Cir. 2009).

Gonzalez–Flores has also identified opinions in which the BIA held that an alien was entitled to voluntary departure, but each of those cases similarly involved aliens with significant positive equities. In *Matter of Gonzales–Figeroa*, the BIA upheld a grant of voluntary departure where the alien had lived in the United States for fifteen years, had a pending visa petition filed by his lawful permanent resident mother, and his sister and two nieces were United States citizens. 2006 WL 729784, at \*1–2 (BIA Feb. 10, 2006).

Although the alien in that case had four assault convictions and a conviction for resisting arrest, the BIA credited the alien's testimony that the convictions were the result of a drinking problem, and that he no longer drank after successfully completing a rehabilitation program. *Id.* at \*1. Similarly, in *Matter of Hernandez–Garcia*, the BIA reversed a denial of voluntary departure where the alien had a United States citizen wife and child, even though the alien had impersonated a United States citizen in order to procure a passport. 2012 WL 1705671, at \*1 (BIA Apr. 11, 2012); *see also Matter of Pineda–Castellanos*, 2005 WL 3833024, at \*1–2 (BIA Nov. 16, 2005) (affirming an IJ's grant of voluntary departure to an alien with a lawful permanent resident wife and three children, but indicating that such relief was barely warranted given the negative equities of six criminal convictions). By contrast, the BIA affirmed a denial of voluntary departure where the alien was arrested twice for driving on a suspended license and once for a DUI, despite the alien's family ties to the United States. *Matter of Posadas–Posadas*, 2012 WL 371659, at \*1–2 (BIA Jan. 18, 2012).

As these cases illustrate, Gonzalez–Flores has failed to carry his burden of showing that aliens with his scant positive equities received relief. *See Rojas–Pedroza*, 716 F.3d at 1263. In fact, Gonzalez–Flores has failed to identify even a single case on point, which in any event would be insufficient on its own. *See Valdez–Novoa*, 780 F.3d at 920–21.

Defendant Ramos-Barajas has not shown that he had even “minimal” positive equities. His felony conviction for possession of a controlled substance with intent to sell was at least as serious as Gonzalez–Flores' state robbery conviction. Defendant's lack of prior misdemeanor convictions, such as Gonzalez–Flores had, is not a significant distinguishing fact.

Defendant cites *United States v. Alcazar–Bustos* in support of his assertion that it was plausible that he would have been granted voluntary departure. As *Gonzalez–Flores* noted,

1 however, the defendant in *Alcazar-Bustos* had substantial positive equities which were  
 2 distinguishable from Gonzalez-Flores' "minimal" positive equities. Defendant also cites *United*  
 3 *States v. Basulto-Pulido*, 219 Fed.Appx. 717 2007 WL 201100 (Jan. 25, 2007) in which the court  
 4 stated that if defendant had been informed about voluntary departure, he "might have applied for  
 5 and received this relief rather than conceding deportability, with its attendant harsh  
 6 consequences." The court held that defendant had a plausible claim for voluntary departure, but  
 7 there is no indication that the court engaged in the two step process set forth in *Valdez-Novoa*  
 8 and *Gonzalez-Flores*. *Basulto-Pulido* does not provide persuasive authority that Defendant  
 9 plausibly would have been granted voluntary departure in the absence of any positive equities.

10 Defendant relies on *Matter of M-A-S*, 24 I. & N. Dec. 762 (BIA), 2009 WL 729481  
 11 (2009) in which the respondent entered the United States on an F-1 student visa, but failed to  
 12 carry a full course load. The Department of Homeland Security (DHS) initiated removal  
 13 proceedings, and the immigration judge initially found that respondent was ineligible for any  
 14 relief from removal. While the case was on appeal, DHS requested that the removal proceedings  
 15 be reopened and that respondent be allowed to again apply for voluntary departure. On remand,  
 16 the immigration judge denied the respondent's request for asylum, withholding of removal, and  
 17 protection under the Convention Against Torture. The immigration judge granted respondent  
 18 voluntary departure, but ordered that he be held in custody until his departure. The respondent  
 19 appealed the denial of his asylum and other applications, and the denial of bond pending his  
 20 voluntary departure. The respondent asserted that he feared harm if he returned to Qatar because  
 21 the FBI had suggested to him in an interview that he had ties to terrorist groups. The  
 22 circumstances in *Matter of M-A-S* are not similar to those in this case. The respondent did not  
 23 have any negative equities other than he had not complied with the education requirements of his  
 24 student visa. There was no evidence that he had committed or been convicted of any crime. *M-*  
*A-S* did not involve a challenge to the grant of voluntary departure, and there was no discussion  
 25 regarding the factors that weighed for or against granting voluntary departure.

26  
 27 In *Matter of Pina-Galindo*, 26 I. & N. Dec. 423 (BIA 2014), the respondent had multiple  
 28 convictions related to intoxication, including a 2005 third degree felony conviction for driving

1 while intoxicated. The immigration judge denied respondent's motion for cancellation of  
 2 removal because he was statutorily ineligible for that relief. The immigration judge did,  
 3 however, grant him "the privilege of voluntary departure." *Id.* at \*423. The decision dealt  
 4 entirely with the denial of respondent's request for cancellation of removal, and there was no  
 5 discussion of the equities that weighed for or against the grant of voluntary departure.

6 In *Matter of Perez-Valle*, 17 I. & N. Dec. 581 (BIA 1980), the issue was whether  
 7 respondent was a citizen of the United States as he claimed. Although the record indicated that  
 8 respondent was granted "voluntary return" to Mexico in 1966, there was no discussion regarding  
 9 the merits of that earlier decision or what negative or positive equities may have existed in 1966.

10 In *In re: Alicia Brumant*, 2013 Immig. Rptr. LEXIS 4884 (BIA Nov. 29, 2013), the board  
 11 held that the respondent, a lawful permanent resident, was subject to removal based on her  
 12 conviction for possession of a controlled substance. The immigration judge granted respondent  
 13 voluntary departure. Although the decision did not discuss the positive or negative equities  
 14 relating to the grant of voluntary departure, the fact that respondent was a lawful permanent  
 15 resident is a significant positive equity and distinguishes *Brumant* from this case.

16 In *In re: Clemente Jimenez*, 2011 Immig. Rptr. LEXIS 7466 (BIA Nov. 29, 2011), the  
 17 immigration judge denied the respondent's request to continue his removal hearing so that his  
 18 mother could become a naturalized citizen and respondent's visa preference category could be  
 19 converted to a Category 1 family preference, thereby increasing his chances of being able to  
 20 adjust his status inside the United States. The immigration judge granted respondent voluntary  
 21 departure. In affirming the denial of a continuance, the board noted that respondent had  
 22 committed another crime while the immigration proceedings were being continued, and that he  
 23 had an extensive criminal history, including convictions for burglary, driving under the  
 24 influence, and possession of a controlled substance. The board did not discuss what positive  
 25 equities may have existed to support the grant of voluntary departure which was not appealed.

26 In *In re: Chialilui-Dlx*, 2011 Immig. Rptr. LEXIS 848 (BIA Mar. 23, 2011), the  
 27 respondent appealed the immigration judge's decision finding her inadmissible at entry based on  
 28 a criminal conviction in Taiwan for using an illegal drug-heroin. The decision dealt with the

1 issue of whether the immigration judge properly relied on information provided about the drug  
2 conviction. The board noted that respondent entered the United States in 2000, and married a  
3 United States citizen in 2004. She gave birth to a child in 2008 who was also a United States  
4 citizen. The board affirmed the immigration judge's decision denying respondent's  
5 admissibility. Although there was no discussion regarding the immigration judge's grant of  
6 voluntary departure, the respondent had significant positive equities; a husband and child who  
7 were United States citizens and an eight year period of continuous residence in the United States.

8 In *In re Robledo-Amaya*, 2008 Immig. Rptr. LEXIS 9267 (BIA Dec. 18, 2008), the  
9 board affirmed the immigration judge's denial of respondent's request for change of venue and  
10 motion to continue proceedings. The immigration judge found that respondent was not eligible  
11 for a waiver under section 212(h) on the INA based on his 2007 state conviction for possession  
12 of cocaine. The board reversed the immigration judge's denial of respondent's request for  
13 voluntary departure based his conclusion that he did not have legal authority to grant such relief.  
14 The board stated that "[t]he record reflects that despite the respondent's drug conviction, the  
15 Immigration Judge would have granted voluntary departure in discretion." *Id.* at \*4. The board,  
16 however, did not discuss the equities or circumstances that warranted granting voluntary  
17 departure.

18 In *United States v. Gamez-Irias*, 2016 WL 4376340 (N.D.Cal. Aug. 17, 2016), the district  
19 court followed *Gonzalez-Flores* in holding that defendant failed to prove that he was prejudiced  
20 by the immigration judge's failure to inform him that he was apparently eligible for voluntary  
21 departure. The defendant had minimal negative equities and had no positive equities. The  
22 defendant argued that voluntary departure is a less significant form of relief than others and  
23 therefore requires a lesser showing of equities. He also argued that positive equities are only  
24 relevant to compensate for negative equities such as a criminal conviction. The court rejected  
25 this argument, noting that defendant cited no cases supporting that proposition. *Id.* at \*4. The  
26 court also found that the cases cited by defendant did not support his claim that he plausibly  
27 would have been granted voluntary departure. *Id.* at \*4. In *United States v. Torre-Hernandez*,  
28 2018 WL 3058857 (D.Idaho June 20, 2016), the court found that it was plausible that defendant

would have been granted voluntary departure if he had given the opportunity to apply for that relief. The defendant had several positive equities, including (1) strong family ties within the United States because he had two children who were born here and were United States citizens, and his half-sister, with whom he had recently resided, had legal status; (2) he had primarily lived in the United States for the previous 14 years, coming to the United States as a young man; and (3) he had a history of employment in the United States. Defendant's negative factors including misdemeanors for disturbing the peace and driving under the influence of alcohol, and prior deportations and a prior unlawful reentry conviction. The court, quoting *United States v. Juarez-Franco*, 2013 WL 1285105 (S.D.Cal. Mar. 27, 2013), stated that it was "[i]mportant . . . that the alien had not been convicted of any drug offenses, and did not 'have any serious or violent criminal history.' *Id.* at \*6." *Id.* at \*4.

## CONCLUSION

Defendant Ramos-Barajas has not carried his burden of showing that it was plausible that he would have been granted voluntary departure. Defendant had a prior felony conviction for possession of a controlled substance with intent to sell. He does not have any positive equities that would support the granting of voluntary departure. He was, therefore, not prejudiced by the immigration judge's failure to inform him that he was apparently eligible for voluntary departure. Accordingly,

## RECOMMENDATION

**IT IS HEREBY RECOMMENDED** that Defendant's Motion to Dismiss Indictment (ECF No. 22) be **denied**.

DATED this 4th day of April, 2019.

  
 GEORGE FOLEY, JR.  
 UNITED STATES MAGISTRATE JUDGE

## NOTICE

Pursuant to Local Rule IB 3-2, any objection to this Finding and Recommendation must be in writing and filed with the Clerk of the Court within fourteen (14) days. The Supreme Court has

1 held that the courts of appeal may determine that an appeal has been waived due to the failure to  
2 file objections within the specified time. *Thomas v. Arn*, 474 U.S. 140, 142 (1985). This circuit  
3 has also held that (1) failure to file objections within the specified time and (2) failure to properly  
4 address and brief the objectionable issues waives the right to appeal the District Court's order  
5 and/or appeal factual issues from the order of the District Court. *Martinez v. Ylst*, 951 F.2d 1153,  
6 1157 (9th Cir. 1991); *Britt v. Simi Valley United Sch. Dist.*, 708 F.2d 452, 454 (9th Cir. 1983).

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